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No. 94-1987

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

GLOVER BOTTLED GAS CORP., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, on the record in this case, the court of appeals correctly held petitioners' challenge to the National Labor Relations Board's computation of backpay to a discriminatee to be barred by *res judicata*.

2. Whether the Board's award of backpay to two discriminatees was supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) is reported at 47 F.3d 1230. The decision and order of the National Labor Relations Board (Pet. App. 5a-8a) and the decision of the administrative law judge (Pet. App. 9a-24a) are reported at 313 N.L.R.B. 43.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1995. The petition for a writ of certiorari was filed on June 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are engaged in the sale and distribution of propane gas and related products in the New York metropolitian area. Pet. App. 31a-32a.[1] In February 1983, Local 282 of the International Brotherhood of Teamsters (the Union) called an economic strike against petitioners, who responded by hiring permanent replacements for the strikers. *Id.* at 33a, 34a. In April 1983, the Union made an unconditional offer to return to work on behalf of the striking employees. Although positions were available, petitioners refused to reinstate any of the strike participants. *Id.* at 35a, 41a. In response, the Union filed unfair labor practice charges with the National Labor Relations Board, charging petitioners with discrimination based on protected union activity. On February 8, 1989, the Board found, *inter alia*, that petitioners' refusal to reinstate the strikers to available positions violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), and that petitioners violated Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), by discharging Union steward Ralph Kendrick in July 1984 in retaliation for his agreement to give testimony in a Board proceeding. Pet. App. 25a, 61a, 73a, 74a.[2] The Board ordered petitioners

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[1] The five petitioners in this case—Glover Bottled Gas Corp., Vogel's, Inc., New York Propane Corp., Synergy Gas Corp., and Synergy Group, Inc.—stipulated before the National Labor Relations Board that they constitute a single employer for purposes of the National Labor Relations Act. Pet. App. 29a.

[2] Petitioners had discharged Kendrick before the strike began for unrelated reasons, but reinstated him pursuant to an arbitral award after the strike ended. Pet. App. 57a-58a. Peti-

to offer reinstatement to Kendrick and the strike participants, and to make them whole for any loss of earnings they might have suffered, with backpay "to be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950)." *Id.* at 77a-78a.[3] On June 13, 1990, the United States Court of Appeals for the Second Circuit enforced the Board's order. *Id.* at 84a-94a.

2. a. Thereafter, the Board's General Counsel issued a specification of the amount of backpay that petitioners owed Kendrick and the strike participants. After a hearing, the administrative law judge (ALJ), applying the Board's *F.W. Woolworth* formula for calculating "net" backpay awards, found that Kendrick was entitled to $13,878.38, and that strike participants Joseph Leone and Robert Cabral were entitled to $19,950.61 and $2,522.63, respectively, plus interest, for the period beginning on the date of petitioners' unlawful conduct and ending March 4,

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tioners subsequently discharged Kendrick again, this time, as noted above, in violation of the Act.

[3] Under *F.W. Woolworth*, backpay is computed "on the basis of each separate calendar quarter or portion thereof during the period from the [employer's] discriminatory action to the date of a proper offer of reinstatement." 90 N.L.R.B. at 292-293. The backpay award is calculated "by deducting from a sum equal to that which [the employee] would normally have earned for each such quarter or portion thereof, [his] net earnings, if any, in other employment during that period." *Id.* at 293 (footnote omitted). Moreover, "[e]arnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter." *Ibid.* This Court upheld the Board's *F.W. Woolworth* formula in *NLRB* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344 (1953).

1991, the date on which petitioners extended to them a valid offer of reinstatement. Pet. App. 13a, 23a, 78a.

The ALJ rejected petitioners' contention that any award of backpay to Kendrick would amount to an impermissible "windfall" because his total interim earnings exceeded his total gross backpay. Pet. App. 23a-24a. The ALJ explained that, under *F.W. Woolworth*, net backpay is calculated on an independent, quarterly basis, and noted that "[petitioners] do[] not dispute that in 4 of the 27 calendar quarters of his backpay period, [Kendrick] had no earnings to offset the gross backpay due him for each of those quarters." *Ibid.*

The ALJ also rejected petitioners' contention that Leone's backpay award should be reduced because, petitioners alleged, he quit equivalent jobs at two trucking companies—Gould, Inc., and Treadways Express—without good cause. *Id.* at 20a-21a. The ALJ agreed with petitioners that "[a] discriminatee who, without good cause, quits a comparable job with an interim employer has thereby incurred a willful loss of earnings, warranting a reduction in backpay." *Id.* at 21a. The ALJ found, however, that Leone was justified in resigning from Gould, Inc., because that firm had required him to drive consecutive hours in excess of Department of Transportation regulations, and that Leone was justified in leaving Treadways Express because "business got very slow" at that firm and Leone was able to find "steady work" in Florida. *Ibid.*

Lastly, the ALJ rejected petitioners' contention that Cabral was not entitled to any backpay because he had left equivalent employment at Crestwood Metals Corp. in order to accept a position as a cross-country driver for Big Bee Transportation Co. *Id.* at

21a-23a. The ALJ found that Cabral's driver/yard laborer position at Crestwood Metals was not in fact equivalent to his former job with petitioners, and that Cabral was therefore justified in leaving Crestwood Metals in 1987 "in search of a more desirable job." *Id.* at 22a-23a.

b. The Board affirmed the ALJ's findings and conclusions and, with a minor modification not relevant here, adopted his backpay order. Pet. App. 5a-8a.

3. The court of appeals enforced the Board's backpay order. Pet. App. 3a-4a. The court noted that the Second Circuit had already enforced the Board's underlying unfair labor practice findings, and that two of the issues raised before the court—including the question "whether the calculation of * * * discriminatee[] [Kendrick's] back pay award should be performed pursuant to the traditional *F.W. Woolworth* quarterly formula—were actually decided by the Second Circuit, and are, therefore, *res judicata*." *Id.* at 4a. The court concluded that "[n]one of the rest of the factual issues [raised by petitioners] come [*sic*] close to raising a legal question (substantial evidence on the whole record), and we therefore wonder why the employer would bring his second petition to either court of appeals." *Ibid.*

ARGUMENT

1. a. Petitioners contend (Pet. 12) that the court of appeals' decision, insofar as it sustained on *res judicata* grounds the Board's use of its *F.W. Woolworth* formula to compute Kendrick's backpay award, "squarely conflicts" with the decision of the Tenth Circuit in *La Favorita, Inc.* v. *NLRB*, 48 F.3d 1232 (1995) (Table) (*reproduced at* Pet. App. 95a-100a). There is no merit to that contention.

In *La Favorita*, the court concluded in an unpublished opinion that, because "[t]he applicability of the *F.W. Woolworth* formula was not raised in the earlier enforcement proceedings before this court, and [the court] did not address it," the court would entertain the employer's challenge to the use of that formula on review of a Board backpay order. Pet. App. 97a.[4] Here, by contrast, the court of appeals found that the Second Circuit, in the earlier enforcement proceeding, "actually decided" the question whether Kendrick's backpay award "should be performed pursuant to the traditional *F.W. Woolworth* quarterly formula." *Id.* at 4a. Although petitioners assert (Pet. 5-6, 13) that that question was neither litigated before nor considered by the Second Circuit in the earlier enforcement proceeding, that assertion is insufficient to undermine the court of appeals' application here of familiar principles of *res judicata*.[5]

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[4] The *La Favorita* court went on to reject the employer's claim that the Board should have applied a formula "whereby total actual earnings are subtracted from the total pay the [discriminatees] would have earned had they continued to work for [the employer]," holding instead that "the Board acted within its broad remedial power" in applying the *F.W. Woolworth* formula. Pet. App. 97a, 99a. The *La Favorita* court, therefore, rejected the substantive argument that petitioners make here. See pp. 7-9, *infra*. The allegedly conflicting decisions are thus consistent in outcome.

[5] We note that, in the earlier proceeding, the Second Circuit "granted" the Board's "petition for enforcement of its order" (Pet. App. 94a), and that the Board's order had specified, in its provision requiring make-whole relief, that backpay was "to be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950)" (*id.* at 78a). The doctrine of *res judicata*, of course, applies not only to issues the losing party actually raised in the earlier proceeding, but also to issues

That holding by the court below is case-specific and raises no issue warranting further review.

b. In any event, there is no merit to petitioners' contention (Pet. 18) that the Board's use of the *F.W. Woolworth* formula to calculate Kendrick's backpay resulted in an impermissible "windfall" to Kendrick. Prior to the *F.W. Woolworth* decision, the Board had calculated backpay as "the difference between (a) what the employee would have earned in the position which was discriminatorily terminated and (b) what he actually earned in other employment during the *entire period* commencing on the date of discrimination and ending with the date of offer of reinstatement." *F.W. Woolworth Co.*, 90 N.L.R.B. 289, 291 (1950) (emphasis added). Based on its cumulative experience in enforcing the Act, however, the Board concluded that its original methodology had wrought a "deleterious effect upon the companion remedy of reinstatement," *id.* at 292, and, consequently, that the old formula "f[ell] short of effectuating the basic purposes and policies of the Act," *id.* at 291. Specifically, the Board's experience demonstrated that

> [w]hen an employee, sometime after discharge, obtained a better paying job than the one he was discharged from, it became profitable for the employer to delay an offer of reinstatement as long as possible, since every day the employee put in on the better paying job reduced back pay liability. Again, the old formula, in the same circumstances, put added pressure on the employee to waive his right

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it could have raised. See Restatement (Second) of Judgments § 24 (1982). The Tenth Circuit's reasoning to the contrary in its unpublished opinion in *La Favorita*, *supra*, was unnecessary to the result in that case. See note 4, *supra*.

> to reinstatement, since by doing so he could terminate the running of back pay and prevent the continuing reduction of the sum coming to him. To avoid these consequences the Board laid down its new method of computation.

NLRB v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 347-348 (1953). In *Seven-Up Bottling Co.*, this Court upheld the Board's adoption of the *F.W. Woolworth* formula as within the Board's "discretionary power to mould remedies suited to practical needs." *Id.* at 351-352.

Petitioners, in effect, seek a return to the old formula under which they would have profited by their delay in offering Kendrick reinstatement. Petitioners unlawfully discharged Kendrick on July 10, 1984, but they did not offer him reinstatement until March 4, 1991. Kendrick suffered four calendar quarters of unemployment prior to that date, and the Board awarded him backpay for only those quarters. Pet. App. 23a-24a.[6] Under the old formula of calculating backpay over the entire period between the discrimination and the offer of reinstatement, petitioners would have reduced their monetary liability by virtue of their delay in offering Kendrick reinstatement. Under this Court's decision in *Seven-Up Bottling Co.*, however, it is settled that the Board may utilize the quarterly method of computing backpay in

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[6] Although petitioners assert (Pet. 19) that "[i]t was only in the first quarter of 1990 * * * that for three months [Kendrick] did not secure employment," the Board's specific finding to the contrary raises only an evidentiary matter that does not warrant further review. Indeed, the ALJ stated that the finding was undisputed. Pet. App. 23a.

order to deter avoidance of the employer's reinstatement obligation.

Petitioners assert (Pet. 16) that the facts surrounding Kendrick's post-discrimination employment make application of the *F.W. Woolworth* formula inappropriate in this case. As this Court observed in *Seven-Up Bottling Co.*, however, "in devising a remedy the Board is not confined to the record of a particular proceeding." 344 U.S. at 349. Petitioners have not identified the type of unique circumstances that would make *F.W. Woolworth* relief "oppressive and therefore not calculated to effectuate a policy of the Act," *ibid.*, and, in any event, their fact-bound remedial argument does not warrant this Court's review.

2. Petitioners contend (Pet. 19-21) that the court of appeals' enforcement of the Board's award of backpay to employees Leone and Cabral conflicts with decisions of other courts of appeals. The cases on which petitioners rely, however, are factually inapposite. In each of those cases, the court found, based on the record before it, that the employee in question had incurred a willful loss of earnings by quitting his or her interim employment without sufficient justification. See, *e.g.*, *NLRB* v. *Hopcroft Art & Stained Glass Works, Inc.*, 692 F.2d 63, 65 (8th Cir. 1982); *NLRB* v. *Aycock*, 377 F.2d 81, 84-85 (5th Cir. 1967). Here, however, the Board found that both Leone and Cabral left their positions for specific, justifiable reasons (Pet. App. 20a-23a) and, therefore, did not incur a willful loss of earnings. Although petitioners disagree with the Board's factual findings (Pet. 21-23), those findings were sustained by the court of appeals as supported by substantial evidence (Pet. App. 4a), and raise no issue warranting further review. See *Universal Camera Corp.* v. *NLRB*, 340

U.S. 474, 490-491 (1951) (this Court will disturb a court of appeals' application of the substantial evidence standard "only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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